U.S. Department of Labor

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Issue Date: 28 April 2011

Case No.: 2010-STA-00024

In the Matter of

RICHARD E. TABLAS
Complainant

v.

DUNKIN DONUTS MID-ATLANTIC
Respondent

Appearances:

PAUL O. TAYLOR, Esq.
For the Complainant

RANDALL C. SCHAUER, Esq.
For the Employer

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT[1]

Jurisdictional Basis

This proceeding involves a complaint filed under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act"), as amended, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305), and its implementing regulations, 29 C.F.R. Part 1978.[2] Among other things, this provision protects an employee who refuses to operate a vehicle where operation violates standards related to commercial vehicle safety, or where the employee has a reasonable apprehension of serious injury because of the vehicle's hazardous safety condition.

[1] Effective August 31, 2010, administrative law judge determinations that have not been appealed to the Administrative Review Board are now characterized as "Final" rather than "Recommended." See "Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982," (Interim Rule), 75 Fed. Reg. 53,544, at 53,557 (Aug. 31, 2010), codified at 29 C.F. R. § 1978.110(a).
[2] Unless otherwise noted, all references are to Title 29, Code of Federal Regulations (C.F.R.).

Procedural History

As stipulated by the parties, on January 18, 2008, the Complainant filed a Complaint with OSHA officials, alleging that the Respondent violated the Act by terminating his employment. See 29 C.F.R. § 1978.102; see also Complainant's Pre-Hearing Statement at 2. On January 27, 2010, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor, issued preliminary findings. The Regional Administrator determined that the preponderance of the credible evidence did not establish any nexus between the Complainant's alleged protected activity and his termination from employment. In addition, the Regional Administrator also commented that the Complainant's failure to follow the Respondent's rules and regulations was a legitimate business reason for his termination from employment.

On February 2, 1010, through counsel, the Complainant, in accordance with § 1978.105, timely filed an objection to the Secretary's Findings and requested a formal hearing before the Office of Administrative Law Judges. A hearing was held before me in Cherry Hill, New Jersey, on June 9, 2010, at which the parties had full opportunity to present evidence and argument. Both parties filed closing briefs.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.[3] I have considered the entire record, including the parties' briefs, the documentary evidence, and the hearing testimony.

The Parties' Contentions

As set forth in their post-hearing briefs, the parties' positions are as follows:

Complainant

- His refusal to drive on December 13-14, 2007, based on an apprehension of dangerous driving conditions as well as concerns about the condition of his assigned truck, constituted protected activity under the Act.[4] Complainant's Brief at 18-23.

- The preponderance of the evidence establishes that his termination from employment was motivated by his protected activity. Complainant's Brief at 24-28.

- The Respondent failed to prove by clear and convincing evidence that it would have discharged the Respondent from employment, in the absence of protected activity. Complainant's Brief at 29-30.

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[3] The following abbreviations are used in this Decision: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; "T." refers to the transcript of the June 9, 2010 hearing.

[4] As will be discussed below, the evidence adduced at hearing suggested that the Complainant also engaged in protected activity earlier in his employment, when he complained to the Respondent about overweight loads. See, e.g., T. at 65-72. Although this issue is not specifically addressed in the Complainant's brief, I will discuss it.

- He is entitled to reinstatement and other relief under the Act. Complainant's Brief at 29-35.

Respondent

- The Complainant failed to establish a prima facie case of retaliatory discharge because his refusal to drive on December 13-14, 2007 did not constitute protected activity under the Act. Respondent's Brief at 12-26.

- The Complainant was not retaliated against for making complaints about overweight loads. Respondent's Brief at 27-32.

Issues

The following issues are presented for adjudication:

- Whether the Complainant's actions on December 13-14, 2007, in refusing to drive an assigned load, constituted protected activity under the Act;

- Whether the Complainant's complaint about the condition of his assigned vehicle, on December 13-14, 2007, constituted protected activity under the Act;

- Whether, during his employment, the Complainant's complaints about overweight loads constituted protected activity under the Act;

- Whether the Complainant's termination from employment was causally related to one or more incidents of protected activity; and

- If the Complainant's termination was related to protected activity, whether the Respondent has established, by clear and convincing evidence, that it would have terminated his employment, notwithstanding the protected activity.[5]

[5] Section 1536 of the 9/11 Commission Act, Pub. L. 110-53, 121 Stat. 266 (Aug. 3, 2007) amended 49 U.S.C. § 31105. Among other things, the amendment clarified the standards of proof. This subparagraph represents the standard, as set forth in the amendment. See "Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982," (Interim Rule), 75 Fed. Reg. 53,544, at 53,545 (Aug. 31, 2010), codified at 29 C.F. R. § 1978.109(b). See also Reiss v. Nucor Corp., ARB Case No. 08-137 (ARB: Nov. 30, 2010), slip op. at 7-8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulated Facts

The parties stipulated to the following salient facts: Complainant's Pre-hearing statement at 2; T. at 6-8.

1. The Complainant was an employee of the Respondent within the meaning of the Act from October 31, 2005 to December 18, 2007.

2. As an employee of the Respondent, the Complainant operated commercial motor vehicles having gross vehicle ratings of 10,001 pounds or more on the highways in interstate commerce.

3. On the evening on December 13-14, 2007, the Complainant refused to complete a dispatch originating in Lancaster, Pennsylvania, and consigned to Bellingham, Massachusetts.

4. The Complainant's gross wages for calendar year 2007 from the Respondent were $46,698.

I find that the evidence of record supports these stipulations.

Documents Submitted by the Parties

The Complainant submitted the following Exhibits: [6]

- Weight/Scale tickets, dated 06/12/2007 and 08/28/2007. CX 1.

- Excerpts from the Respondent's "Driver Handbook" plus a signed acknowledgment from the Complainant, dated 12/1/2005, indicating he had received the Handbook. CX 2.

- Vehicle Inspection Report, filled out and signed by the Complainant, dated 12/13/2007. CX 3

- Service Report, Penske Truck Leasing, dated 12/19/2007. CX 4.

- E-mails, dated 12/13/2007 and 12/14/2007, written by Daniel O'Hara and Gisel Smith, respectively. CX 5.

- Undated, signed statement of MaryEllen Howard. CX 6.

- Undated, signed statement of Brett V. Peters. CX 7.

[6] The Complainant withdrew Complainant's Exhibit 13 (CX 13). T. at 283.

- Statement of Brett V. Peters, dated 12/14/2007. CX 8.

- National Oceanographic and Atmospheric Administration/National Weather Service (NOAA) Weather Reports for 12/13/2007 and 12/14/2007. CX 9.

- Discharge Notice, dated 12/18/2007, signed by the Complainant. CX 10.

- Complainant's W-2 Form for 2007, from Respondent. CX 11.

- Complainant's objections to the OSHA Regional Administrator's Determination, dated 02/02/2010. CX 12.

- Google Maps routing, Lancaster PA to Bellingham MA. CX 14.

The Respondent's Exhibits include the following:[7]

- Employee Handbook (Drivers, Warehouse Staff and Helpers). RX 1.

- Daily logs – other drivers – 12/13/2007. RX 7.

- Written Warning: Failure to Complete Route, dated November 6, 2007. RX 10.

- Incident Report, dated 11/06/2007, from Gisel Smith. RX 11.

- Complainant's Response to Respondent's First Request for Admissions, dated April 26, 2010. RX 17.

- Extract, Complainant's Response to Respondent's First Set of Interrogatories, undated. RX 18.

<u>Testimony at Hearing</u>

All witnesses testified under oath. The hearing testimony is summarized as follows:

<u>Gisel Smith</u>

Ms. Smith is a third-shift dispatcher for Dunkin' Donuts, at its distribution center in Westhampton, New Jersey. She stated that she gives assignments to the drivers, telling them where the loads are and what time they are to be delivered or picked up. She stated she was

[7] The Employer withdrew Respondent's Exhibits 6, 12, 13, 14, 15, and 16 (RX 6, 16). T. at 283-86. In addition, I find that the following Respondent's Exhibits, which I admitted, are duplicative of the Complainant's Exhibits as noted in parentheses. RX 2 (CX 7); RX 3 (CX 8); RX 4 (CX 6); RX 8 (CX 3); RX 9 (CX 10). In addition, RX 5 contains two documents: one is duplicative of CX 5; the other is duplicative of RX 11. For ease of discussion, I will refer to the Complainant's Exhibit rather than the corresponding Respondent's Exhibit in this Decision.

working the night of the incident involving the Complainant, December 13-14, 2007. Ms. Smith testified she was aware the weather forecast that night predicted snow, but it had not snowed at her location. She stated she spoke with some of the drivers, to find out what road conditions were like. Ms. Smith testified that the Complainant arrived at the terminal around midnight, and he told her he did not want to take the load because he heard the roads were bad. She stated she told him she had not had any problems and that other drivers had not reported any problems. Ms. Smith also stated that the Complainant did not mention any problems with his truck at that time, but that after she told him he had to take the load he told her that one of the lines on his truck had broken, but did not specify which line. She stated she called Penske to service the truck, and also stated that Penske is required to respond to calls regarding loaded trucks. She stated the normal dispatch time for drivers to make the run to Lancaster was 8:00 pm, with delivery in Bellingham between 6:00 and 8:00 am. The product normally delivered to Bellingham is cups. T. at 27-37.

On cross-examination, Ms. Smith stated none of the other drivers had any complaints about road conditions on the night in question. She explained the comment in her e-mail (CX 5) that the Complainant did not do the run due to the weather was based on the Complainant's comment that he was not going to deliver the load that night, but would deliver it in the morning. She stated she had this conversation with the Complainant on the telephone, before he arrived back at the terminal. Ms. Smith stated she told the Complainant there would be consequences if he refused to take a load. She stated she would not force a driver to go out in bad weather but also remarked that she relied on the reports from drivers on the road regarding weather conditions. Regarding the broken line, Ms. Smith stated that the Complainant would have been assigned a different truck to complete the run. T. at 37-40.

Ms. Smith described a prior occasion where the Complainant had refused to take a load. The Complainant reported to pick up the load, but it was not ready, and the Complainant refused to wait. Ms. Smith stated she did not have hiring or firing authority over drivers and commented that the Complainant told her he liked to do short runs and did not like to be out overnight. She stated she had no knowledge of any issues involving the Complainant and overweight trailers. T. at 40-45.

On re-direct examination, Ms. Smith explained that she makes the call on whether roads are impassable, based on common sense and what the drivers tell her. She also stated she expects drivers to make judgment calls. She stated all the other drivers reported they arrived at their destination, but conceded the drivers did not tell her the routes they took. Regarding the Complainant's truck, Ms. Smith stated it would have taken an hour for Penske to make a replacement truck available. She stated the Complainant's complaint about the air line was "bogus" because it was not made until after he already stated he was not going to Bellingham. She conceded that the Complainant had done overnight runs on several occasions, and remarked that every driver would like to be home, so there was nothing unusual about not liking overnight runs. On re-cross examination, Ms. Smith reiterated that the Complainant told her he would complete the run at 8:00 in the morning. T. at 46-57.

Richard Tablas

Richard Tablas, the Complainant, discussed his educational and professional background, and stated that he has held a commercial driving license since about 1989. He stated he has been involving in the trucking industry since about 1980, and has driven in bad weather many times. He stated he has never had an accident where he was charged as "at fault" and has never had a moving violation. The Complainant estimated he has driven between 1 million and 1 ½ million miles in commercial vehicles. T. at 59-64.

The Complainant testified that CX 1 contained a "weight ticket" dated June 12, 2007, showing that a load was 81,280 pounds, which was over the legal weight limit of 80,000 pounds. The Complainant also testified that CX 1 also contained a weight ticket dated August 28, 2007, showing a load of 85,520 pounds, which also was overweight. The Complainant stated that these overweight loads were coming from the same source, Guida Dairy ("Guida"), and he said he talked to Brett Peters, a supervisor, about the problem. The Complainant also described a third incident, on November 28, 2007, where he suspected the trailer was overweight and weighed about 87,000 pounds, and he stated that he discussed that issue with Maryellen Howard, who was one of the daytime dispatchers. He said she told him to take the trailer to be weighed, which he did, and it weighed 86,640 pounds. The Complainant stated that when he backed off the scale, a couple of the springs on the left side of the trailer broke. He took the trailer back to the dairy, and commented that he felt that Ms. Howard was "confrontational" with him. The Complainant stated that when he got back to the terminal, he left a note for Mr. Krzywizki about the matter. He also stated that the first two times he had an issue with the overweight trailers, he talked to whomever was on duty about the matter, but the third time, he got more emphatic and talked to Mr. Peters and Mr. Krzywizki. The Complainant stated that, the following day, he received a call from Carl Grisham, the Ryder service manager, the lessor of the trailer, who wanted to know why there was $5,000 worth of damage to the trailer, and he told him about the problem with overloaded trailers, and then Mr. Grisham said he would schedule a meeting with Tim Kennedy, whom the Complainant called "the big boss" to seek a resolution to the problem. T. at 64-75.

Regarding the incident on December 13-14, 2007, the Complainant stated he spoke with Ms. Howard in the morning, and she told him he had a dispatch from Westhampton to Lancaster to Bellingham, with a reporting time of 8:00 pm. The Complainant stated he had made that run before and remarked it would take about two hours to get to Lancaster and then seven hours to Bellingham, for a total time of about nine hours. T. at 76-81.

The Complainant stated that he was aware, from news on the internet, there was to be a big winter storm in the Northeast. He stated he discussed this with Ms. Howard and she said she was aware of the weather, and there were no changes to the dispatch at that point. The Complainant stated he also spoke with Mr. Peters about the weather, and expressed that he was concerned because his normal trailer was in the shop and he would be driving a substitute unit. The Complainant stated he continued to monitor the weather, and was aware by about 5:00 pm that the governor of Connecticut had issued a press release that, among other things, asked tractor trailers to stay off the interstates to give the snow plows an opportunity to work. In addition, at some point interstate highways 84 and 91 were closed. He stated these routes were

not necessarily routes he had to use to get to Bellingham, but also remarked that, unless he took a lengthy detour, it was necessary to go through Connecticut to get to that destination. T. at 82-87.

The Complainant stated he spoke about his concerns regarding the substitute tractor to Mr. Peters, who told him he needed to drive the substitute tractor because it was the only one available. The Complainant stated he spoke with Danny O'Hara, another daytime dispatcher, about 6:30 pm, and told him about trailers being stuck in Connecticut. He testified: "I said that I really do not feel safe, you know, doing this route. I'd prefer to, you know, to wait until the roads are plowed. I said that the thought of driving up in to this bad weather had almost made me physically ill from the anxiety and I just had a really bad, unsafe feeling about it." T. at 88. The Complainant stated that Mr. O'Hara told him they were too busy, and if he did not do the run, "there's going to be repercussions tomorrow, you're probably going to lose your job." T. at 88. The Complainant stated he spoke again with Mr. O'Hara about 6:30 pm and again at 8:00 pm, who told him both times that no other drivers had reported problems. T. at 83-90.

The Complainant stated he picked up the vehicle, and stated that on inspection the tractor did not show any problems. The Complainant testified that he drove the empty trailer to Lancaster, Pennsylvania, where he dropped the empty trailer and picked up a loaded trailer of cups. He stated that on the way to Lancaster he realized he had left his EZ-Pass in his usual tractor, which was his mistake. He said he came back to New Jersey via another route that did not require tolls, and intended to stop at the Westhampton depot to pick up his EZ-Pass, which was not far out of his way. The Complainant stated that, presuming he picked up the EZ-Pass about midnight and left Westhampton at that time, by 1:00 am or shortly after he would be driving in inclement weather. The Complainant stated that, from the internet, the weather seemed to be a big mess, with sleet starting around New Brunswick, sleet and freezing rain and ice up into the New York City area, and snow starting right about at the Connecticut border. He stated that on his return from Lancaster, he was able to tune into a New York City radio station, which was reporting route 287 was so icy that trucks were sliding across the median strip. T. at 90-100.

On his arrival at Westhampton, the Complainant stated, there are two sharp right turns, and when he was doing that he lost air pressure and the trailer brakes locked up. The Complainant stated the emergency line popped out, as it was designed to do. The Complainant stated the emergency air line unhooked from the trailer. He stated he could see that it had come off; he put it back again, but it popped off when he got back into the tractor. The Complainant stated he asked a security guard for assistance holding the line back on, so he could move the trailer out of the way of other traffic, and the guard did so. The Complainant stated he presumed there had been some damage to the "glad hands" that hold the air lines, so he wrote up what he thought the problem might be. The Complainant stated he gave the report (CX 3) to Gisel Smith at the dispatch window. He said he told her he came back to get his EZ-Pass, and had the problem with the tractor. He stated that Ms. Smith initially told him to bring the unit to Penske for repair, but she eventually agreed to have Penske come over to look at it. The Complainant stated he also discussed with her that he did not feel safe to continue, with the roads being icy, and said he asked if he could come back in the morning to continue the trip, after the tractor was repaired, and he also remarked that he probably would not be getting to Bellingham any later, considering the state of the roads. The Complainant said he asked Ms. Smith if she had heard

from any of the other drivers and she said no, and said their conversation "turned confrontational." The Complainant said he made the decision not to go that night because he did not feel it was safe to drive on icy roads, and he remarked that he was also worried about the substitute unit. He said that, considering all the factors, "it was best to just delay a simple 10 hours and continue on." T. at 100-09.

In response to a question regarding why not drive until conditions got too dangerous, the Complainant responded that stopping on an icy road, or even pulling onto the shoulder of an icy road, were dangerous. He stated it is not legal to park on the shoulder and go to sleep. The Complainant stated that most of the roads he would have driven have shoulders but that does not mean an icy shoulder is a good place to spend the night. The Complainant stated he knew the whole area very well, and it was basically impossible to find a parking spot anywhere in the Northeast, because it is so densely populated, with only a few truck stops that fill up quickly, and that in bad weather the situation is even worse. The Complainant stated that Connecticut has many rest stops, but very limited truck parking, and the truck stops he is familiar with also have limited parking as well. The Complainant stated that the conversation with Ms. Smith got a little heated, and she said that he would be terminated in the morning, to which he responded that he would "rather be alive than fired." He stated he knew he was responsible in the event of an accident and he was making the call not to drive. He stated he then went home. T. at 109-13.

In the morning, the Complainant stated, he went to the dispatch window about 10:00 am, but nobody wanted to speak to him. He said Mr. Peters told him to go home, as the load was already taken up to Bellingham. The Complainant stated the next Tuesday, Mr. Krzywizki told him to come in to talk for a few minutes. He stated he went in and he and Mr. Krzywizki discussed the incident, and that Mr. Krzywizki gave him a termination letter and told him that other drivers had made the trip without any problem. The Complainant stated that Mr. Krzywizki told him he had no choice but to terminate him for refusal to complete the trip. The Complainant identified CX 10 as the termination letter and stated that, although the letter was dated December 13, he actually was terminated on December 18, 2007. T. at 113-15.

The Complainant confirmed he received a warning letter for refusing work regarding a dispatch. The Complainant stated that, in retrospect, he handled the matter badly, and also stated he deserved the warning. With regard to employment, the Complainant stated he has continuously looked for work since leaving Dunkin' Donuts, but has been unsuccessful. He stated he would like to return to work at the company, and also testified briefly about the remedies he sought. T. at 116-21.

On cross-examination, the Complainant stated he could not recall an occasion when he had to stop driving due to weather conditions when he was already on the road. He disagreed with Ms. Smith's contention that if a driver called to say he was uncomfortable due to the conditions, that she would tell him he should not drive; he stated that in his experience, dispatchers were likely to argue the point, and try to encourage drivers to go farther. T. at 122-26.

With regard to the overweight load issue, the Complainant stated he picked up overweight loads at the Guida Dairy in New Britain, Connecticut. He said he was unaware of the company policy for dealing with overweight loads, and said when he called he was told to go to Bordentown and get the cargo weighed. He stated that New Britain was about a four-hour trip and Bordentown was about 10 miles from his terminal. The Complainant stated he took an overweight trailer back to Guida Dairy, on November 28. The Complainant conceded he never talked to the safety director, Mr. McCorry, about overweight trailers, and he confirmed that November 28 was the last time, prior to the termination from employment, that he had been involved in an overweight issue. T. at 126-134.

The Complainant agreed that if a driver encountered conditions that required him to stop or seek shelter, the driver should report the situation to the dispatcher. The Complainant also acknowledged that the employee handbook stated that refusal of a run assigned by an authorized individual would result in immediate discharge. The Complainant acknowledged he preferred to use his own truck. He also acknowledged that failure to take his EZ-Pass was his own mistake, and acknowledged that the pre-trip inspection form included entries for checking air lines and for the EZ-Pass. The Complainant stated he did not mind overnight deliveries, but preferred not to be on the road for three or four days, and admitted he told Mr. Peters he preferred the shorter runs. As to the incident of December 13-14, the Complainant stated he monitored the weather off the internet by punching in locations on his route, and printed off weather reports, but admitted he did not give the reports to anyone at Dunkin' Donuts. The Complainant conceded that he told Danny O'Hara at 6:30 pm that he was not feeling well, and stated he would liked to have called off making the run, but Mr. O'Hara would not let him. He also stated it was his intention, when he left Lancaster, to go back to Westhampton to pick up his EZ-Pass; he said he was unable to call any of the other drivers for road information, because he did not have the cell phone numbers for any of the other drivers. The Complainant stated the most recent time he accessed the internet on that date was about 7:50 pm. T. at 135-148.

The Complainant said he did not notice any problems with the air lines when he picked up the trailer in Lancaster, and he acknowledged that it is the driver's responsibility to hook up the air lines from the new trailer to the tractor. He also stated he did not have any problems with the air lines before he got to Westhampton. The Complainant stated he recalled that Ms. Smith was "very adamant that I should complete the run." He agreed that he presumed all the other drivers had stopped due to the weather, but admitted that drivers would be expected to call the dispatcher in this situation. T. at 146-52.

The Complainant was referred to RX 17 (Request for Admissions) and confirmed that he did not make any phone calls to anyone to inquire about road conditions, including state transportation departments, highway patrols, or other drivers. The Complainant acknowledged that Dunkin' Donuts had contracts with both Ryder and Penske, and stated he had not thought about whether he would be able to park at a Ryder or Penske facility en route if he had trouble due to road conditions. The Complainant confirmed that there was a Ryder repair facility at the Westhampton terminal with mechanics available 24 hours a day, but stated that the truck he was driving was a Penske truck and so the Ryder mechanics would not have worked on it. The Complainant reiterated that the air line came loose when he arrived at the Westhampton terminal. T. at 152-60.

On further examination, the Complainant identified a common routing from Lancaster to Bellingham, and noted the distance to be 366 miles, and stated it was not necessarily the route that he took on any specific occasion. He also acknowledged that the route he took was almost all interstate highways. He stated it was possible to get off the highway at an exit but he might encounter problems trying to park. He also stated that the interstates are probably safer than the secondary roads, because they are more likely to be plowed. T. at 160-65.

Maryellen Howard

Ms. Howard testified that she is a dispatcher for Dunkin' Donuts and has worked there since September 2006. She stated her primary function is to communicate with the drivers and that, among other things, she gives the drivers their work assignments. Ms. Howard discussed assigning the Complainant to the run on December 13-14, 2007, which involved a dispatch to Lancaster, Pennsylvania, to pick up cups and then a scheduled delivery at Bellingham, Massachusetts. She stated she gave the Complainant the assignment for the run over the phone, and that initially there was no discussion about the weather. She stated later that day they had conversations about the weather, but she could not recall the time. She stated the gist of the conversation was he called her attention "to the fact that weather was expected." She stated she reminded him he was required to make an attempt, and there was no bad weather at Westhampton. She stated the Complainant also told her he had been in a substitute truck for his prior run and she told him that if his regular truck was not available he would use a substitute truck. T. at 174-80.

Ms. Howard identified CX 6 and stated on that the morning of December 14, she was asked by Mr. Krzywizki to document the conversations she had with the Complainant. She stated it was part of her job to be aware of weather conditions, and she used the internet (weather.com) to do so. She stated she had drivers going to places other than Bellingham on that date, and it was part of her job as dispatcher to monitor weather in all directions, and for that she used the internet. Ms. Howard stated that during her last conversation with the Complainant, he stated that he wanted to speak to her dispatch partner, Brett Peters, and that in the afternoon the Complainant asked her if she was aware that the National Weather Service had forecast six to 12 inches of snow for New England. T. at 180-83.

On cross-examination, Ms. Howard stated that in her experience as a dispatcher, if a driver called to say he was facing hazardous conditions, she would tell the driver to pull over at the next safe place. Regarding the Complainant's discussion about a substitute tractor, Ms. Howard stated she told him they would check with the shop to see if his tractor's repairs had been completed and, if not, he would be using a substitute unit; she stated the Complainant had a distaste for using a substitute tractor. She stated that if something happened such as a driver not completing a run, she would refer the matter to Brett Peters first, and if he was not available, to Tom Krzywizki, and she confirmed that Mr. Krzywizki is the supervisor for the drivers and the dispatchers. Ms. Howard stated that some drivers are more comfortable than others, driving in bad weather, and also stated: "As soon as a driver is not comfortable, he needs to come off the road." T. at 186. She stated that the Complainant had told her he preferred to be home, meaning not do overnight runs, and she accommodated that preference when she could, but she also remarked that short runs were used to accommodate drivers who had needs such as medical

appointments. With regard to the Complainant's concerns about overweight trailers, Ms. Howard stated that he needed to weigh the trailer, but did not recall him asking about where to get his load weighed. She also remarked it did not make sense to have the load weighed in Bordentown if it was overweight in Connecticut. She stated that if the trailer was weighed and was overweight, she would have advised to take the trailer back to the shipper so they can cut the load. T. at 183-92.

On re-direct examination, Ms. Howard indicated it was the usual feeling among drivers that they would not like to drive a truck that is not their own truck. She stated she has the authority to authorize a driver to take himself out of service due to bad weather, and she stated that when a driver is afraid, he is a potential hazard. With regard to weather, she stated the driver should get to the bad situation before calling to report it; if he is uncomfortable, he should stop at the closest safe haven, and if the driver is on the interstate and cannot exit, he should go to the shoulder of the road. If there is no shoulder, Ms. Howard stated that a shoulder is safer than driving if the driver is afraid, and she remarked that in her experience as a dispatcher, she had never had a storm land on one of her drivers. T. at 192-99.

Brett Peters

Mr. Brett Peters stated that he is employed by the Respondent, and in December 2007 his title was "ICC Dispatcher." In that capacity, he stated, he assigned loads to drivers and maintained the drivers' hours of service. He identified CX 7 as a document he prepared at the request of his supervisor, Tom Krzywizki, the morning after the incident involving the Complainant. He confirmed he dispatched the Complainant for his route to Bellingham on December 13, 2007. Mr. Peters stated that he knew on the afternoon of December 13 that a snow storm was forecast for New England, based on the internet, and also based on reports from drivers. He also stated that the Complainant had expressed concern about the forecast, and told the Complainant he was aware of the snow. He stated that the following morning when he came in to work he found out that the Complainant did not take the run. According to the statement (CX 7), the Complainant's reasons for not taking the run were weather and the air lines. Mr. Peters identified CX 8 as another report he wrote on December 14 at the request of Mr. Krzywizki. T. at 201-10.

On cross-examination, Mr. Peters stated that if a driver calls in and says he is not comfortable driving, he should not drive and should pull over. He stated that is why there are breaks, and the driver can take a two-hour or eight-hour break and be ready to drive at the end of the break. He stated he would never force anyone who did not feel comfortable to drive through a storm. He stated he explained to the Complainant that they were very tight on drivers and he needed him to at least try to take the load. Mr. Peters conceded he cannot recall whether he explained to the Complainant at the time that he could pull over and wait out the storm, but also remarked that was understood by all the drivers. He stated that they did not shut everything down because of the storm and the drivers were expected to at least "give an effort." Mr. Peters stated he was familiar with the Complainant's concern about overweight loads from Guida Dairy. He stated his guidance was that if the load was overweight, for the driver to go back and have the dairy pull off a pallet. He stated that the Complainant was not the only driver who had the issue with the overweight loads and remarked he did not understand why the Complainant

would drive all the way down to Bordentown with an overweight load. Mr. Peters stated he did not recall an event where the Complainant had a load from the dairy weighed at New Britain, and to his knowledge the scale tickets the Complainant brought were all from the Bordentown area. Mr. Peters denied that Mr. Krzywizki told him to treat the Complainant differently because of his complaints about overweight loads. T. at 210-16.

On re-direct examination, Mr. Peters stated he expected a driver to find a safe haven to pull over, and stated a rest area would be the best place. He conceded he would require a driver to drive under most conditions. On my questioning, Mr. Peters clarified that he wrote the document at CX 8 before he wrote the document at CX 7, and he said that although he could not remember when he wrote the second document, it was either the same day or the day after he wrote the first one. T. at 216-20.

Thomas Krzywizki

Thomas Krzywizki stated he is employed by the Respondent as the operations manager for the truckload services division, and was in that position in December 2007, as well. He stated that his job involves overseeing the day to day operations of the truckload services division. He testified that the decision to terminate the Complainant's employment was a joint decision between him and the Human Resources (HR) department, and he confirmed that prior to making the decision to terminate the Complainant's employment he gathered information regarding the Complainant's refusal to complete the dispatch to Bellingham. He confirmed that he had obtained CX 5, 6, 7, and 8 at the time he made the decision to terminate the Complainant. He stated the decision to terminate the Complainant's employment was made "a couple of days" after the incident, after the information had been gathered, and he stated that he sat down with HR, went over everything, and then made the decision. Mr. Krzywizki also confirmed that at the time the decision was made to discharge the Complainant that the Complainant had refused to complete the run in part because of bad weather and in part because of a problem with the air line or his assigned tractor. He identified CX 10 as the termination document given to the Complainant, and stated that he had prepared it. T. at 220-26.

On examination of CX 10, Mr. Krzywizki confirmed that one of the reasons cited for the Complainant's termination was disobeying instructions issued by supervisory personnel, citing Section A-27 of the Employee Handbook (RX 1). He stated that dispatchers are supervisory personnel, and the dispatchers involved at that time were Danny O'Hara on the second shift and Gisel Smith on the third shift. As to Section A-28 of RX 1, refusal of a run, Mr. Krzywizki stated a driver is not allowed to refuse a run except in the cases of emergency. He stated that in the event of a snowstorm, a driver was not allowed to refuse a run but needed to make an attempt, and he also stated that if an emergency was declared the driver would not be sent out on the road. T. at 226-28.

On cross-examination, Mr. Krzywizki stated the Complainant was terminated from employment based on Section A-28, paragraph 1, because he brought his load back and left his trailer, telling the dispatcher he would be back in the morning. Mr. Krzywizki commented there was no reason for him to bring his load back to the yard. He stated the only acceptable reason to bring a load back to the yard would be a family emergency, and said in the event that a driver

encountered what he believed to be unsafe weather conditions, the driver should pull over at that point. Mr. Krzywizki clarified that it was not a terminable offense to pull over under unsafe weather conditions, and in such circumstance he would expect a driver to find a safe haven. Mr. Krzywizki confirmed the Complainant was given a warning earlier for failing to wait for his pickup assignment, and stated that incident was reviewed with HR. Mr. Krzywizki indicated he was familiar with the Complainant's complaints about overweight loads, and stated that in such circumstance he would be instructed to get the load weighed at a nearby scale house (one mile from Guida), and if there were any issues, to take the load back to the dairy to have it offloaded. However, he stated, the Complainant would get the load weighed in Bordentown, which is about five miles from the terminal, and then bring it into the yard. He stated that the decision to terminate the Complainant's employment did not have anything to do with the complaints about overweight loads, and he remarked that the issue was brought to the shipper's attention, which solved the problems. He reiterated that the reasons for the Complainant's termination from employment were covered in the documents, and stated that the earlier warning issued to the Complainant had also been taken into consideration. Mr. Krzywizki stated that if the Complainant had started the run and then had called to report he was unable to drive due to unsafe road conditions, that would not have necessarily constituted an offense for which termination was appropriate. T. at 228-233.

On re-direct examination, Mr. Krzywizki conceded that a driver who encounters unsafe conditions might have to drive for a while until he reaches a point where it is safe to pull over. He stated that some shoulders are wide enough to pull over safely on. Regarding CX 3, he noted that the mechanic from Penske stated that the air lines were in good shape on December 14. He identified CX 4 as a document from a Penske subcontractor, which noted repairs made to a damaged trailer air supply line and the installation of a new line. He confirmed the two documents related to the same tractor. T. at 233-38.

William McCorry

Mr. McCorry stated he is the safety compliance manager for Dunkin' Donuts and has held that position since May of 2007. In that capacity, he stated, he conducts training and sets policies and procedures regarding safety and compliance. Previously, he stated, he had worked as a driver and driver supervisor, and had been cross-trained as a dispatcher as well. He stated that the company's policy was that when a driver experiences inclement weather or experiences conditions he feels incapable or uncomfortable driving in, the driver is to find the nearest safe haven and pull over. Mr. McCorry stated he did not know anything specific about the incident on December 13-14, 2007, until after the Complainant's employment had been terminated. He stated he also heard there was an issue with overweight loads from Guida Dairy, and said that someone called the diary and asked them to adjust their loads, and that took care of the problem. T. at 242-47.

Mr. McCorry stated that drivers are required to do three types of inspections: pre-trip inspection, prior to putting the tractor trailer into service; inter-trip inspections, after either 2 to 3 hours or 150 miles, whichever comes first; and post-trip inspection.[8] Mr. McCorry stated that

[8] Inter-trip is rendered as "inner trip" in the transcript. T. at 248.

Dunkin' Donuts uses its own form, which exceeds the federal requirements for pre-trip inspections and includes a checklist of other items (such as equipment). In the event a driver notes a defect on a post-trip inspection, the driver turns the form in to the dispatcher, who relays the information to the mechanics. If there are no defects, the driver retains the form for a specified period. T. at 248-50.

Mr. McCorry stated it was the driver's responsibility to hook the air lines from the tractor to the trailer, and also the driver's responsibility to take the EZ-Pass (and he noted that the EZ-Pass was an item on the driver's checklist). He stated he was familiar with the "Whistleblower Protection Act" which he stated forbids a company from forcing, intimidating or threatening to fire a driver for refusing to drive in conditions he perceives could cause harm. T. at 250-55.

Mr. McCorry identified RX 7 as logs for drivers who ran routes similar to the Complainant on December 13-14, 2007. He noted that if a driver was required to stop driving due to road conditions it should be reflected in the service log. Mr. McCorry said there were no adverse consequences to the Complainant based on his reports of overweight loads and remarked that, to the contrary, that was the type of feedback from drivers that was appreciated. T. at 255-66.

On cross-examination, Mr. McCorry stated that he conducts audits of drivers' logs to ensure the drivers are in compliance with regulations. On re-direct examination, Mr. McCorry stated that a replacement tractor could have been provided for the Complainant had he expressed concerns about his assigned equipment, without any problem. T. at 266-78.

Credibility of the Witnesses

During the course of the hearing, which took place over a full day, I had ample opportunity to observe the witnesses and their demeanor. In general, all of the parties, including the Complainant, appeared to be sincere and forthcoming in their testimonies. Although memories as to details differed, most of the witness testimony was remarkably consistent. In addition, virtually all of the witness testimony as to the events of December 13-14, 2007 was supported by the documentary evidence of record. Thus, there are very few contested facts.

Discussion

Elements of a Complaint under the Act

The Act[9] prohibits discharge, discipline or discrimination of an employee who refuses to operate a vehicle because (i) "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security"; or (ii) "the employee has a reasonable apprehension of serious injury to the employee or the public because of the

[9] This is the standard under the current version of the Act, as amended by Public Law 110-53, § 1536, 121 Stat. 464 (Aug. 3, 2007). See Formella v. Schnidt Cartage, Inc., ARB Case No. 08-050 (ARB: Mar. 19, 2009), slip op. at 4. The incident at issue here occurred after the effective date of the amended Act, so the current version applies.

vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B). "Reasonable apprehension" is defined as follows: "[A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2). Moreover, in order to qualify for protection under the Act, the complaining employee "must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." Id.

To prevail on a claim under the Act, a complainant must establish the following elements:

1. The Complainant engaged in protected activity, as defined in the Act;[10]
2. The Employer was aware of the protected activity;
3. The Employer subjected the Complainant to adverse action; and
4. There is a causal link between the protected activity and the adverse action.

Yellow Freight Systems, Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994); Bettner v. Daymark, Inc., ARB Case No. 01-088, 2000-STA-41 (ARB: Oct. 31, 2003), slip op. at 13-14; Formella v. Schnidt Cartage, Inc. ARB Case No. 08-050, (ARB: Mar. 19, 2009), slip op. at 4 (citing Regan v. Nat'l Welders Supply, ARB Case No. 03-117 (ARB: Sept. 30, 2004), slip op. at 4). The burden is on the Complainant to establish all of these elements by a preponderance of the evidence. See Coppola v. Quality Assoc., Inc., ARB Case No. 02-114 (ARB: Aug. 29, 2003), slip op. at 3. Failure to prove any one of these elements results in dismissal of a claim. Eash v. Roadway Express, Inc., ARB No. 04-036 (ARB: Dept. 30, 2005), slip op. at 5.

Once a complainant establishes a prima facie case, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the adverse action. Calhoun v. U.S. Dept. of Labor, 576 F.3d 201, 209 (4th Cir. 2009). However, after a case has been fully tried on its merits, it is not appropriate to determine whether a prima facie showing has been established, but rather to examine whether the complainant has proved by a preponderance of the evidence that the respondent discriminated due to protected activity. See Calhoun v. United Parcel Serv., ARB Case No. 04-108 (ARB: Sept. 14, 2007), slip p. at 8. Nevertheless, it is helpful to analyze this matter in light of the elements the Complainant is required to establish.

Whether the Employer Subjected the Complainant to Adverse Action

Under the Act, an employer is prohibited from "discharging, disciplining, or discriminating against" an employee in retaliation for engaging in protected activity. There is no question that, in this case, the Respondent terminated (or discharged) the Complainant from employment. CX 10. The record indicates the Complainant was discharged on December 18,

[10] In Hilburn v. James Boone Trucking, ARB Case No. 04-104 (ARB: Aug. 30, 2005), slip op. at 3, the Board stated that a complainant must first establish by a preponderance of the evidence that he engaged in activity protected by the Act, then must establish the other elements, also by a preponderance of the evidence.

2007, several days after the incident relating to the Bellingham dispatch. Id. The statute specifically lists discharge as an adverse action. 49 U.S.C. § 31105(a)(1). Thus, it is clear that discharge from employment constitutes adverse action.

I find, therefore, that the Complainant has established that he was subjected to adverse action when he was discharged from his employment as a driver for the Respondent, Dunkin' Donuts.[11]

Whether the Complainant Engaged in Protected Activity

In this case, the Complainant has alleged that he engaged in protected activity in a number of ways: first, by making complaints about overweight shipments from Guida Dairy; second, by stating that his assigned truck for the run on December 13-14, 2007, was defective in that there were problems with the air lines; and, third, by refusing to drive the assigned run to Bellingham, Massachusetts on December 13-14, 2007, due to inclement weather in New England, that he expected to encounter en route. Complainant's Brief at 15-26.

I will discuss each of the Complainant's allegations in turn.

Overweight shipments

The evidence establishes that, as the Complainant testified, on several occasions he made complaints about overweight shipments coming from the Guida Dairy in Connecticut.[12] T. at 68-76; 127-32. In addition to the Complainant, multiple witnesses testified about his complaints about the overweight shipments. T. at 188-92 (Ms. Howard); 212-15 (Mr. Peters); 231-32 (Mr. Krzywizki). On at least two occasions, the Complainant produced "weigh tickets" showing that his rig was over the prescribed weight of 80,000 pounds.[13] CX 1. The Complainant testified that these tickets related to Guida Dairy shipments. T. at 65-67. He testified that he made such complaints to the dispatchers and to Mr. Krzywizki and Mr. Peters. T. at 73-74. Various officials at Dunkin' Donuts testified that they were aware of the issue and in fact took action to get the dairy to change its loading practices, to prevent overweight loads. T. at 231-32 (Mr. Krzywizki); 246-47 (Mr. McCorry). The Complainant stated the latest incident involving the

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[11] The record also establishes that the Complainant was given a "warning" in November 2007, when he refused to wait for a load. RX 5, 10; T. at 41-43. Because no party asserts that the "warning" related to any activity protected under the Act, I decline to address whether the warning constituted adverse action.

[12] In his post-hearing brief, the Complainant cited "filing complaints with Dunkin' Donuts related to violations of commercial safety regulations" as protected activity. Complainant's brief at 15. However, the Complainant did not discuss this allegation in any detail. Based upon the evidence adduced at the hearing, I shall presume that the protected activity to which the Complainant refers to here were his complaints about the overweight shipments from Guida Dairy.

[13] The Complainant's testimony that 80,000 pounds was the maximum allowable weight was uncontradicted. T. at 66-67. Thus, I shall presume that the Complainant's statement that a weight in excess of that weight violated federal truck safety regulations was accurate.

dairy occurred in late November 2007, shortly before his termination from employment. T. at 69-75.

Based on the evidence, I find that the Complainant's complaints to Dunkin' Donuts officials about overweight loads from Guida Dairy constituted protected activity under 49 U.S.C. § 31105(a)(1).[14]

Air Lines on Vehicle

The Complainant testified that he completed the portion of the run that required him to go to Lancaster, Pennsylvania, on December 13, 2007, and that about midnight he returned to the Westhampton terminal to pick up his EZ-Pass, which he had forgotten. The Complainant stated that the truck he was driving was not his assigned vehicle. T. at 95-98. He stated that when he arrived at the depot he made two sharp right turns, in succession, and that this action caused the air lines connecting his truck and the trailer to come unhooked. T. at 100-05. The Complainant stated he wrote up the defect and reported the problem to his dispatcher, Gisel Smith. T. at 106-07. He also stated that failure to have operating air lines renders a vehicle unsafe. T. at 93-95.

Gisel Smith, the night dispatcher, testified that she was aware of the problem with the air lines when the Complainant reported it, and also stated she called for a repair, and that because the truck was loaded with product repairs were to be done immediately. T. at 30-31. Documentary evidence indicates the truck was repaired, within a few days after the incident. CX 4; see also CX 3.[15]

The Complainant testified he told Ms. Smith he recommended that he wait till morning, when the truck was repaired and the weather had cleared up, to continue the run. T. at 108. The Complainant also testified that Ms. Smith did not offer him another vehicle, but did offer to get the vehicle that he had been driving repaired. T. at 113. Ms. Smith stated she called for repair. T. at 31-32. It is not completely clear, from the record, whether the Complainant was explicitly told to wait for a repair. However, the Complainant admitted that he made the decision to go home and not continue the run. T. at 108.

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[14] I also note that the evidence indicates that the Complainant picked up these overweight loads in Connecticut and drove them on the highway to New Jersey, where he obtained the "weigh tickets." CX 1; see T. at 67-68. There is no evidence that officials at Dunkin' Donuts required or encouraged the Complainant to violate commercial motor vehicle standards by driving with overweight loads; to the contrary, the evidence indicates that Dunkin' Donuts officials directed the Complainant to return to the shipper with the overweight loads and have pallets offloaded, so his vehicle could come into compliance with weight rules. See, e.g., T. at 188-89.

[15] The record is silent as to why the repair was made on December 19, rather than on December 13-14, the date the Complainant reported the problem.

As will be discussed in more detail below, the evidence is that the principal basis for the Complainant's refusal to make the run was his concern about the weather, and his anticipation about adverse road conditions relating to the weather. Assuming, arguendo, that the Complainant's concern about the air lines also played a part in his refusal to make the Bellingham run, I find that the Complainant's concern did not constitute protected activity.

Under the Act, an employee who refuses to operate a vehicle based on a "reasonable apprehension of serious injury" because of the vehicle's "hazardous safety or security condition" is protected from adverse action by the employer. See 49 U.S.C. § 31105(a)(1)(B)(ii). Such apprehension is considered reasonable only if a reasonable person in such circumstances would conclude that the condition "establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2).

The Complainant is an experienced long-haul truck driver, who holds a commercial driver's license. T. at 61-65. He testified that the absence of functional air lines on his vehicle was dangerous. T. at 93-95. In addition, Ms. Smith (who also holds a commercial driver's license) agreed that the lack of functioning air lines constituted a safety hazard. T. at 30-31. I find, based on this evidence of record, that the Complainant's concern regarding the air lines on his vehicle -- which already once had become disconnected from the trailer -- was a reasonable concern about a hazardous safety condition.

Where an individual refuses to operate a vehicle due to a hazardous safety condition, the statute also requires: "To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105(a)(2). I find that there is no evidence that the Complainant sought to have the problem presented by the air lines corrected, and was refused. Rather, as the Complainant himself admitted, he did not wait for the repair; rather, he made the decision to refuse to make the rest of the run, and went home. T. at 108-09. Consequently, I find that the Complainant's complaint about the air lines, though reasonable and related to safety, does not constitute protected activity, because there is no evidence the Employer refused to correct the problem.[16]

Adverse Weather Conditions

As noted above, the Complainant testified that he chose not to complete his run to Bellingham because he was apprehensive about the forecast of a snow storm due to hit the New England area. T. at 82-83. The Complainant stated that he informed the dispatchers, Ms. Howard and Ms. Smith, about the weather forecast, and he believed he spoke with Mr. Peters as well. T. at 82, 105-09. He stated that in his conversation with Ms. Smith, which was at about

[16] In his post-hearing brief, the Complainant posits that the issue of the air lines should be analyzed under 49 U.S.C. § 31105(a)(1)(A)(making a complaint) rather than 49 U.S.C. § 31105(a)(B)(ii)(refusal to drive). Complainant's brief at 15-18. Although the issue is a close one, I find that the latter clause is applicable, because the Complainant stated he suggested to Ms. Smith that the tractor be repaired overnight and he would drive in the morning. T. at 107. This statement indicates the Complainant had no intention to drive unless/until the air line was repaired.

midnight after he had he returned to the terminal to pick up the EZ-Pass, that he was concerned about the bad weather. He stated that the situation grew "confrontational" and he made the decision that it would be better not to go out on the run. T. at 107-08. The Complainant stated that, in addition to his concern about adverse road conditions, he was also concerned that there would be no safe place to park his truck, in the event that weather conditions made it difficult or impossible for him to keep driving. T. at 109-12. Specifically, the Complainant cited a lack of truck stops along the route, as well as rest stops that tended to be quite crowded so finding a spot to park could be difficult. T. at 110-11. The Complainant also testified that Ms. Smith told him that none of the other drivers who had been dispatched from the Dunkin' Donuts facility had reported any problems. T. at 108, 152.

Personnel from Dunkin' Donuts testified that the company policy was that drivers were not required to drive if they felt that road conditions were too hazardous to continue. T. at 47 (Ms. Smith); 184-186 (Ms. Howard); 211-12 (Mr. Peters); 245 (Mr. McCorry). Many stated that the proper course of action for a driver who felt that road conditions were unsafe was to pull off at the nearest "safe haven." T. at 194-95 (Ms. Howard); 216-17 (Mr. Peters); 230, 233 (Mr. Krzywizki); 245 (Mr. McCorry). Notably, the Complainant does not allege that Dunkin' Donuts' practice was to disregard its own policy regarding drivers seeking "safe haven" in bad weather. In sum, the Complainant asserts that refusal to drive based on the apprehension of unsafe conditions, based on weather forecasts, constitutes protected activity under the Act. [17] Complainant's Brief at 18-26.

In support of his position, the Complainant states that the Administrative Review Board and its predecessor authority have recognized that operation of a motor vehicle in adverse weather can constitute a safety hazard, and that a driver's refusal to operate a vehicle in adverse weather conditions constitutes protected activity under the Act. Id.

The Board has long recognized the hazards presented by adverse weather conditions on commercial motor vehicle operations. In Robinson v. Duff Truck Line, Inc., 86-STA-83 (Sec'y, Mar. 6, 1987), the complainant refused to take his regularly assigned vehicle out on a dispatched run. Finding that the employer had violated the Act for terminating the complainant's employment, the Secretary remarked: "Clearly, the intent of this regulation is to prohibit the driving of commercial motor vehicles in adverse weather conditions unless such vehicles can be operated safely. To hold that the regulation applies only when hazardous weather conditions are encountered after dispatch from the terminal is to create the absurd situation of drivers being compelled to take their vehicles at least out of the terminal gate in order to avoid driving in

[17] In the post-hearing brief, the Complainant posits that the issue of inclement weather should also be analyzed under 49 U.S.C. § 31105(a)(1)(A) (making a complaint) in addition to 49 U.S.C. § 31105(a)(B)(ii) (refusal to drive). Complainant's brief at 15-18. I find that latter clause to be applicable, because the Complainant made it very clear that he refused to drive due to the anticipated weather conditions, even remarking to Ms. Smith that he would rather be fired (for refusing a dispatch) and be alive. T. at 112. This comment indicates the Complainant had no intention to drive so long as he had anxiety about the weather conditions.

'sufficiently dangerous' conditions."[18,19] Id., at 5. However, in the Robinson decision, the evidence indicated that hazardous weather conditions were already present at the point of origin for the truck's dispatch, several hours before the dispatch. Indeed, the evidence was that Robinson spoke to the employer's branch manager and told the manager he could not get out of his driveway due to the weather. Robinson, 86-STA-83, slip op. at 2. At that time, it had already started snowing and weather warnings were being issued on local stations.

The Secretary also rejected the employer's contention that, because its other drivers did not report any weather problems, that the roads were not hazardous, as Robinson had contended. Id., at 8. The Secretary also remarked that there was abundant testimonial evidence of hazardous weather conditions in the local area, including testimony of others in addition to the complainant, and stated: "furthermore, there is evidence which in hindsight supports Robinson's analysis as to the weather conditions he would encounter from the beginning of his trip … until his return." Id., at 6 (emphasis added). On appellate review, the circuit court held that the Secretary's decision was supported by substantial evidence, and affirmed. Duff Truck Line Inc., 848 F.2d at 189. The court also remarked: "The successful completion of a mission, in the absence of other evidence, does not necessarily prove that the mission was safe." Id., at 189.

Another case from the late 1980s involving a driver's refusal to drive in inclement weather was Thomas v. Indep. Grocers of Abilene, Tex., Case No. 86-STA-21 (ALJ: Jan. 28, 1987). In that case, the complainant, an over-the-road truck driver, was terminated from employment after refusing to drive in inclement weather. As summarized by the administrative law judge (ALJ), the complainant initially called his supervisor to ask if the run was to be cancelled due to weather, and the supervisor responded that the employer does not shut down for weather-related reasons. Approximately eight hours later, the complainant made a second call, and told his supervisor he did not think it was safe to drive, because he slid off the road in his pick-up truck on the way in to work. The supervisor responded that all of the other drivers were making their runs. The complainant then stated he was not going on the run because he did not feel it was safe.

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[18] The Secretary concluded that the Act was applicable because the version of the Act then in effect prohibited adverse action against an employee who refused to operate a vehicle "when such operation constitutes a violation of any Federal rules, regulations … applicable to commercial motor vehicle safety." The Secretary then determined that the Department of Transportation regulation, at 49 C.F.R. § 392.14 which provides that commercial motor vehicle operations must be discontinued when hazardous road conditions exist, also applied "whenever a driver encounters hazardous weather conditions whether before his dispatch from the terminal or when he is on the road." Id., at 4-5. The circuit court upheld these interpretations as "reasonable" and "not inconsistent with the regulation." Duff Truck Line v. Brock, 848 F.2d 189 (6th Cir. 1988) (unpub.).

[19] The Secretary also found that Robinson's refusal to drive in bad weather because his truck tended to be difficult to handle in ice and snow constituted protected activity under the Act as well, because Robinson had a reasonable apprehension that his equipment was unsafe. Id., at 9-10. I do not discuss this portion of the Robinson decision in relation to the Complainant in the instant case, because I have found that the Complainant's expressed concerns about the air lines in his truck did not constitute protected activity under the Act, as set forth above.

In his decision, which found that the complainant had engaged in protected activity by refusing to make the run in bad weather because he did not believe it was safe to do so, the ALJ found that the complainant had acted reasonably, and cited the complainant's reliance on "weather bulletins, sheriff's department reports, his own personal observations and experience in having his pick-up truck slide off the road, and truckers' statements heard on the CB [radio] regarding the slick condition of the roads." Id., at 9. The ALJ also noted the evidence of record relating to the bad weather at the point of departure for the complainant's run, which included testimony from a National Weather Service meteorologist, weather bulletins for the area for the day in question, and witness testimony (including from a state trooper) relating to the bad road conditions. Id., at 3-6. The ALJ also noted that the complainant's supervisor had assessed the weather situation and had decided the drivers would go out based on his personal observation, media and police reports, and CB reports from truckers. The supervisor admitted he was aware the weather bureau had stated there were hazardous conditions on the local roads, as well as accidents, but nevertheless determined that drivers should go out on their routes. Id., at 6. The ALJ concluded: "The fact that other drivers of Employer decided to make their routes under the same circumstances, and the fact that several of these drivers testified that it was safe to drive and that they had no trouble, was considered when weighing the evidence on reasonableness [citation omitted]; however, I find that the evidence … [as to the reasonableness of the complainant's actions] outweighs the Employer's evidence as to the unreasonableness of Complainant's action." Id., at 10. The ALJ's decision was adopted by the Secretary in its entirety. Case No. 86-STA-21 (Apr. 1, 1987).

The Secretary has also recognized that the Act vests drivers with some discretion to make a determination as to whether driving (or continuing to drive) in bad weather constitutes a safety hazard. In Chapman v. T.O. Haas Tire Co., 94-STA-00002 (Aug. 3, 1994), the Secretary affirmed an ALJ's decision that a driver was protected by the Act for failing to complete a route under the following facts: the route would take him on a two-lane road; six to eight inches of snow had fallen overnight in his location and the destination was located at a higher elevation, northeast of his location (in the direction the bad weather was heading); and his near-empty truck would have been difficult to control. The Secretary noted that the evidence of record substantiated the complainant's contentions, including evidence that there was up to 12 inches of snow in the area of the complainant's destination, with road closures. Id., at 3. The Secretary found that the complainant was protected by the Act when he exercised his discretion to drive a route he had reason to believe was safe (a turnpike) rather than the regular route, which he reasonably believed posed a risk of serious injury. Id., at 5.

Courts also have recognized that drivers who refuse to drive in bad weather are protected by the Act. For example, in Roadway Express, Inc. v. Dole, 929 F.2d 1060 (5th Cir. 1991), the court held that drivers who stopped due to snow and icy conditions were entitled to be paid for the time taken by their delay, and that their employer was prohibited from discriminating against them by refusing them "delay pay" when the employer paid "delay pay" to other drivers in other circumstances.

More recently, the Administrative Review Board also has held that a driver's refusal to drive because adverse weather conditions made driving unsafe may be protected under the Act. In Eash v. Roadway Express, Inc., ARB Case Nos. 02-008, 02-064 (ARB: June 27, 2003), the Board affirmed the ALJ's determination that a complainant had engaged in protected activity when he requested to be excused from driving based on adverse weather conditions (freezing rain) that made it difficult for him to drive to work. Even though the Board upheld the ALJ's determination that the complainant was not entirely credible, it also affirmed the ALJ's finding that the complainant had established a reasonable apprehension of serious injury based on unsafe driving conditions.[20]

The Board has held that a refusal to drive when to do so would violate a commercial motor vehicle regulation constitutes protected activity under the Act under 49 U.S.C. § 31105(a)(1)(B)(i); see Hilburn v. James Boone Trucking, ARB Case No. 04-104 (Aug. 30, 2005), slip op. at 4-5. However, a refusal to drive is protected only if driving would have actually violated the regulation at issue. Ass't Secy & Villanj v. Lee & Eastes Tank Lines, Inc., Case No. 95-STA-36 (Secy: Apr. 11, 1996) (hereinafter, "Villanj"), slip op at 5. A good faith belief that a violation would occur is not sufficient. Hilburn, slip op. at 5. Where the driver's judgment is at issue, in addition to testimony that in the complainant's judgment the roads were unsafe, testimony from other drivers, weather advisories, police reports and meteorological data may be important. In fact, in Villanj, the Secretary commented that not only did the complainant testify as to his personal belief that the roads were unsafe, he also supported his belief with other evidence. Case No. 95-STA-36, slip op. at 6.

At least one appellate court has held that an employee's own apprehension about road conditions is insufficient to establish a safety hazard. Rather, the employee's belief that hazardous condition exists must also be objectively reasonable. Castle Coal & Oil Co. v. Reich, 55 F.3d 41, 45 (2d Cir. 1995), citing Yellow Freight Systems, Inc. v. Reich & Thom, 38 F.3d 76, 82 (2d Cir. 1994).

In the instant case, the Complainant asserts that his refusal to drive due to adverse weather conditions is protected under both subsections of 49 U.S.C. § 31105(a)(1)(B): (i) (violation of regulation) and § 31105(a)(1)(B)(ii) (reasonable apprehension of unsafe conditions). Complainant's brief at 15-24. As indicated above, I find that subsection (i) is not applicable to the facts of this case. Subsection (i) is applicable only when there would be an actual violation of a regulation or standard. See, e.g., Hilburn, slip op. at 4-5. The regulation the Complainant cites, 49 C.F.R. § 396.7(a) states that a motor vehicle shall not be operated "in such a condition as to likely cause an accident or a breakdown of the vehicle." I find this provision is inapplicable to the complainant's refusal to drive in the instant case, because Part 396 of Title 49 relates to "Inspection, Repair, and Maintenance" of vehicles, not operation under adverse weather conditions. In contrast, Part 392 of Title 49, "Driving of Commercial Motor Vehicles," which the Complainant also cited in his brief, has no absolute prohibition against driving in bad weather. Rather, § 392.14 requires "extreme caution" in operation of a commercial vehicle in

[20] More specifically, the Board upheld the ALJ's determination that the complainant's refusal to drive constituted protected activity under subsection 49 U.S.C.§ 31105 (a)(1)(B)(ii) (refusal to drive), not (a)(1)(B)(i) (violation of safety standard).

hazardous conditions, and then states: "If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated" (emphasis added). The regulations indicate that driving in bad weather constitutes a violation of standards only if "conditions become sufficiently dangerous." There is no provision that states that it is a violation to drive if bad weather or hazardous conditions are merely anticipated. To the contrary, 49 C.F.R. § 392.14 indicates a recognition that commercial vehicle drivers will encounter hazardous conditions such as snow and ice. It mandates operation with "extreme caution;" it is only when conditions become "sufficiently dangerous" that vehicles should no longer be operated.

In the instant case, there were no adverse weather conditions in the immediate area at the time the Complainant refused to drive. Thus, operation of the vehicle would not have constituted a violation of any regulation or standard. I therefore find, based on the foregoing, and in light of the specific facts in this case, the Complainant's refusal to drive in anticipation of bad weather does not constitute protected activity under subsection (i).

Under subsection (ii), a refusal to drive constitutes protected activity if the employee has a "reasonable apprehension of serious injury" to himself or the public because of the vehicle's hazardous safety condition. The Act specifically states that the apprehension of injury must be "reasonable" and further states that such apprehension is reasonable only if "a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident or injury." 49 U.S.C. § 31105(a)(2). Additionally, the employee must have sought correction of the hazardous condition from the employer and been unable to obtain it. Id.

In the instant matter, there is no question that the Complainant sought to obtain a correction of the situation from the employer, in that he repeatedly requested that he not be required to complete the Bellingham run. T. at 39-41, 107-08; CX 6-8. What is at issue, then, is whether the Complainant's apprehension was "reasonable" as defined at 49 U.S.C. § 31105(a)(2), which is required in order for his refusal to constitute protected activity.

The Act defines "reasonableness" objectively, by limiting reasonable apprehension to those situations in which a "reasonable individual" would conclude that the condition established a "real danger" of accident or injury. 49 U.S.C. § 31105(a)(2). As noted above, there are precedents that indicate that "reasonable apprehension" under the Act contains both subjective and objective elements. See, e.g., Castle Coal & Oil Co., 55 F.3d at 45.

I find, based on the evidence of record, including the Complainant's testimony, that his apprehension was subjectively reasonable. As the Complainant testified, the vehicle he was to drive was not his usually assigned vehicle, the truck with which he was most familiar. T. at 83; see also CX 6-8. In addition, according to the Complainant, he was familiar with the route he was to travel, and according to him there were very few convenient places for him to pull off the road, if he encountered adverse conditions while en route. T. at 109-12.

Whether the Complainant's contention that the forecast weather conditions created a safety hazard was objectively reasonable is a far closer issue. On cross-examination, the Complainant conceded that there might have been other options as to places to pull over if he encountered bad conditions. T. at 153-55. And although he stated that his conversations with the dispatcher, Ms. Smith, became "confrontational" there is no evidence, from the Complainant or any other source, that a dispatcher refused a driver's request to get off the road if conditions required it. See T. at 108. Consequently, I infer that the Dunkin' Donuts policy, that drivers pull over and find a "safe haven" was adhered to. The evidence establishes that, at the time the Complainant refused to complete the run to Bellingham, which was shortly after midnight on December 13, at the Dunkin' Donuts facility at Westhampton, the weather was not adverse. T. at 99. The Complainant stated that the facility was south of the "sleet line" and there was freezing rain and ice into New York City, and then snow "around the Connecticut border." Id. The Complainant admitted he did not directly contact any authorities to obtain more detailed information about road conditions. RX 17; T. at 153-54. Rather, according to the Complainant, he relied on internet and radio weather reports. T. at 84-85, 106-07. At the hearing, the Complainant presented weather observation reports indicating that between three and 10 inches of snow fell in Connecticut and Massachusetts on December 13 and 14, 2007.[21] CX 9.

Based on the evidence, I find that there were indeed adverse weather conditions in the area to which the Complainant was to be dispatched, in Connecticut and Massachusetts, on the dates in question (December 13 and 14, 2007). However, except for the Complainant's testimony, there is no indication that the weather conditions were exceptionally hazardous or adverse. It is common knowledge that snow in December in New England is not particularly unusual. The weather reports of record, at CX 7, reflect that snow fell, but the amounts involved do not appear to have been extraordinary.

The Complainant has testified that he is a very experienced commercial driver, who has more than a million driving miles in the Eastern United States, and has never had an at-fault accident. T. at 63-65. I find that, considering all the evidence of record, there is no indication that the conditions on December 13-14, 2007, which included rain and sleet in Connecticut and snow in both Connecticut and Massachusetts, were so hazardous that a reasonable commercial driver with the Complainant's experience and skills, would have an apprehension of serious injury. Although the driving conditions on December 13-14, 2007 would not have been pleasant, there is nothing in the record that indicates that this was a situation that would have presented a risk of serious injury to the Complainant or the public, had the Complainant started out on the Bellingham run. I have considered that the Complainant would not have been driving his usual vehicle. Again, however, there is no evidence of record that the fact that the substitute vehicle was, objectively, unsafe. Although the Complainant may not have been as comfortable driving a different vehicle than his usual one, I find that a reasonable professional driver of his experience would have been competent to handle a substitute vehicle safely. Additionally, as noted above, the evidence establishes that the conditions in Westhampton, at the location of the Dunkin'

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[21] The station in Stamford, Connecticut reported "snow/sleet/rain" on December 13, and 2.5 inches of snow on December 14. Other stations reported rain and/or snow, but did not make any specific notations regarding weather conditions. The records do not specify the hours during which precipitation fell. CX 9.

Donuts terminal, were not adverse at all. Indeed, the Complainant himself testified that the terminal was south of what he termed the "sleet line." T. at 99.

The Complainant points out that a driver's refusal to drive in adverse weather conditions has been found to constitute protected activity under the Act. Complainant's Brief at 18-25. He also notes, accurately, that agency guidance interpreting the governing regulations indicate that drivers should exercise their own judgment to determine if conditions are too adverse to drive. Complainant's brief at 23-24. Contrary to the Complainant's contention, however, every reported case in which a driver's refusal to drive due to adverse conditions has been upheld involved adverse conditions that the driver was actually experiencing at the time of the refusal. I am aware of no situation in which a driver's refusal to drive, based on weather conditions he anticipates will occur in the future, has been held to constitute protected activity. This conclusion makes sense. It is common knowledge that weather forecasts are not guarantees, and that predictions of future weather conditions may be inaccurate.

I find that a purpose of 49 U.S.C.§ 31105 is to reinforce the regulatory scheme, whereby drivers are vested with the judgment to determine whether conditions they are experiencing are too hazardous to drive. See 49 C.F.R. § 392.14. I also find that 49 U.S.C. § 31105 is intended to protect drivers who exercise their reasonable judgment regarding adverse conditions they are facing. Contrary to the Complainant's contention, there is nothing in 49 U.S.C. § 31105 or the applicable regulation that extends the authority to a driver to exercise judgment to refuse to drive, when adverse conditions are not present at the time and place of his dispatch, but are only forecast to be present at some time during his dispatched run.

In this case, there is no evidence that the employer failed to adhere to the regulations that vest drivers with judgment to abort their travel when conditions warrant. Thus, I find there is no reasonable apprehension of danger to the driver or to the public, were a driver for Dunkin' Donuts to be required to start a dispatched run, where adverse conditions are forecast but are not present. Consequently, I also find that the Complainant's refusal to drive to Bellingham, on December 13-14, 2007, under the particular facts as set forth above, does not constitute protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii).

Whether the Employer Was Aware of the Protected Activity

As set forth above, I have found that the sole instance of protected activity by the Complainant consisted of his complaints to Guida Dairy regarding overweight loads. Mr. Krzywizki testified that he was involved in the decision to terminate the Complainant's employment. T. at 222. Mr. Krzywizki also stated that he was aware of the Complainant's complaints about the overweight loads at the Guida dairy, but also testified that the Complainant's actions played no role in the termination decision. T. at 231-32. This, I find the Respondent was aware that the Complainant had made such complaints.

Whether there Is a Causal Connection between Protected Activity and the Adverse Action

Termination of employment is an adverse action covered under the Act. 49 U.S.C. § 31105(a)(1). The Board has held that where no clear statements are made by management as to the reason for termination, the test of whether an individual has been discharged depends on reasonable inferences the employee could draw from the employer's conduct. Jackson v. Protein Express, ARB Case No. 96-194, 95-STA-38 (ARB: Jan 9, 1007), slip op. at 3, quoting Pennypower Shopping News, Inc. v. NLRB, 726 F.2d 626, 629 (10th Cir. 1984). For example, a close temporal connection between protected activity and adverse action can lead to the conclusion that the protected activity played a part in the adverse action. Jackson v. Arrow Critical Supply Solutions, Inc., ARB Case No. 08-109 (Sept. 24, 2010), slip op. at 6 n. 7. However, even an inference based on close temporal proximity must yield in the face of evidence to the contrary. See Spelson v. United Express Sys., ARB No. 09-063 (ARB: Feb. 23, 2011), slip op. at 3 n. 3.

Based on the evidence of record, I find that there is no direct evidence that the Complainant's complaints about overweight loads at Guida Dairy played any role whatsoever in his termination from employment. In addition, I find there is no reliable evidence from which I can draw a reasonable inference that the Complainant's complaints on this issue were a factor in his termination from employment. I infer from the evidence, consisting of load weigh slips, that that the Complainant complained about overweight loads from the dairy in June 2007 and August 2007, well before he was terminated from employment on December 18. CX 1. The Complainant also testified that a third incident occurred in November 2007, but the record does not include a weigh slip from that incident. The Complainant's assertion is not contradicted by the Employer, so I find that the incident did in fact occur. See T. at 215.

The Dunkin' Donuts officials who testified uniformly stated that there were no adverse consequences to the Complainant's complaints on this issue; to the contrary, they stated, they were appreciative of his actions. T. at 231-32, 212-16, 266. The Complainant proffers no evidence contradicting their statements, and the timing of the Complainant's termination of employment, which was directly after he refused to complete the Bellingham run due to his apprehension about adverse weather, makes it much more likely that the Complainant's termination from employment was due to the latter event.

Indeed, the evidence of record indicates quite definitively that the Complainant was terminated from employment chiefly, if not solely, because he refused to complete the Bellingham run. T. at 222-25; CX 5-8, 10. Indeed, Mr. Krzywizki, the deciding official, stated that the Complainant was terminated from employment because he refused to complete his assigned run, without excuse. T. at 223-26. Mr. Krzywizki also stated that he compiled statements from others before making this decision. T. at 223. These statements are a matter of record. CX 6-8. Considering that the reason the Complainant articulated for his refusal to drive the vehicle to Bellingham was principally his anxiety about the forecast weather problems, as the Complainant testified and as Mr. Krzywizki confirmed, it is clear that the Complainant's refusal to drive on this occasion was the motivating factor for the adverse action.

However, as discussed above, I also have found that the Complainant's actions in refusing to drive do not constitute protected activity, because the Complainant's actions were not objectively reasonable under the circumstances.

Conclusion

As set forth above, I find that the Complainant is unable to establish all of the elements of a prima facie case, as required, under the Act. Although it is clear that he was terminated from employment, and that this termination constitutes an adverse action, the evidence establishes that the Complainant's termination was not related to his only instance of protected activity (complaints about overweight loads). Rather, the evidence is that the Complainant was terminated for failure to complete a run. Although the Complainant asserts that his failure to complete the run to Bellingham was based on adverse weather conditions, and thus constituted protected activity under the Act, I have found that the Complainant's actions do not constitute protected activity, because they were not reasonable under the circumstances, as is required under 42 U.S.C. § 31105(a)(1)(B)(ii).

Order

Based on the foregoing, the Complainant's complaint is DISMISSED.

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ADELE H. ODEGAARD
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve

the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).